In the Supreme Court of the United States

OCTOBER TERM, 197..

No. 77-4

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

VS.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent.

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
(Civil No. C75-1123, et al.)
Real Parties in Interest.

(See Appendix A hereto for complete list of Real Parties in Interest and Case Numbers)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, The Amalgamated Sugar Company, Amstar Corporation, California Beet Growers Association, Ltd., The Great Western Sugar Company, and U and I Incorporated, respectfully petition this Court for a writ of certi-

orari to review an order of the Court of Appeals for the Ninth Circuit entered in this case on February 28, 1977.

OPINIONS BELOW

The court of appeals rendered no opinion. Its order (App. B p. 9a) is unreported. The opinion of the district court (App. B pp. 10a-16a) is unreported.[1]

JURISDICTION

The order of the court of appeals was entered on February 28, 1977. On May 23, 1977, Mr. Justice Rehnquist granted an extension of time to June 30, 1977, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This litigation consists of over one hundred actions, known as the "Sugar Antitrust Litigation", which have been consolidated for pretrial proceedings in the United States District Court for the Northern District of California before the Honorable George H. Boldt, senior district judge, sitting by special assignment. Petitioners, certain defendants below, filed a motion to disqualify Judge Boldt, accompanied by affidavits of bias and prejudice, certificates of counsel, and other supporting affidavits and exhibits setting forth facts which demonstrated Judge Boldt's bias and prejudice against defendants and in favor of plaintiffs and their counsel, and on the basis of which Judge Boldt's impartiality was questioned. Judge Boldt denied the motion

1. Appendix A sets out the list of cases consolidated for pretrial purposes in the Northern District of California under MDL 201. Appendix B sets out the unreported opinions below. Appendix C is submitted as a separate volume and contains the pertinent portions of the record below. Page references to Appendix C correspond to those of the exhibits submitted to the court below.

and the court of appeals denied defendants' petition for a writ of mandamus seeking to vacate his ruling. The questions presented are:

1. Did the court of appeals err in denying a petition for a writ of mandamus seeking review of an order of the district judge refusing to disqualify himself where:

   a. The affidavits submitted by petitioners set forth a series of *ex parte* communications between the district judge and lead counsel for the adverse parties concerning significant contested issues, and false statements by the district judge concerning matters discussed in these communications, and

   b. The district judge applied an erroneous legal standard under the applicable statutes by (1) refusing to accept as true the facts set forth in petitioners' affidavits, (2) refusing to consider whether, assuming such facts to be true, "his impartiality might reasonably be questioned," or was, in fact, reasonably questioned by the parties; and (3) grounding his decision on the "duty to sit" concept specifically rejected by Congress in the 1974 amendment to 28 U.S.C. § 455(a)?

2. Is mandamus the appropriate remedy to review an order of a district judge refusing to disqualify himself when sufficient grounds have been presented by the moving parties?

STATUTES INVOLVED

28 U.S.C. § 455(a):

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

STATEMENT OF THE CASE

Petitioners are among the defendants in over one hundred private treble damage antitrust actions filed throughout the United States and consolidated in San Francisco before the Honorable George H. Boldt, a senior judge of the Western District of Washington, sitting by special assignment.

In the course of this litigation a number of incidents have occurred which convinced petitioners that Judge Boldt is biased and prejudiced in favor of plaintiffs and that, at a minimum, his actions have been such that his impartiality might reasonably be questioned. Accordingly, petitioners filed a motion requesting that Judge Boldt disqualify himself. This motion was accompanied by affidavits of bias and prejudice, certificates of counsel affirming that the motion was made in good faith, and affidavits and exhibits setting forth the facts upon which the motion was grounded (App. C pp. 1-186; 326-385).

Judge Boldt denied petitioners' motion (App. B pp. 10a-16a), and the court of appeals, without opinion, denied a petition for a writ of mandamus seeking to vacate Judge Boldt's order (App. B p. 9a).

The affidavits and exhibits in support of petitioners' motion to disqualify Judge Boldt set out the following facts:

After the assignment of these cases to Judge Boldt, William H. Ferguson, a member of the Seattle bar and a close personal friend of Judge Boldt (App. C pp. 114-115), became *ad hoc* chairman, and later permanent chairman, of plaintiffs' steering committee (App. C pp. 149-150; 577). From Mr. Ferguson's first connection with these proceedings, there occurred a series of unauthorized *ex parte* communications between Judge Boldt and Mr. Ferguson. These *ex parte* contacts, and the circumstances surrounding them, are as follows:

Mr. Ferguson was counsel for plaintiffs in a private, "non-class action," antitrust suit—the "*1812*" case[2]—brought before Judge Boldt in the Western District of Washington against certain sugar companies some two years before the inception of the present consolidated class action litigation. Mr. Ferguson is not, and never has been, retained as counsel of record for plaintiffs in any of the consolidated class action cases.

After the present class actions were commenced, Mr. Ferguson advised counsel for defendants in the *1812* case that he opposed consolidation of that action with the other sugar cases in San Francisco because it would delay his trial and be "prejudicial to his clients' interests" (App. C p. 139). However, on the evening before the first pretrial conference in the consolidated actions, Mr. Ferguson advised counsel for one of the defendants that he now favored consolidation of his case because "they [counsel for plaintiffs in the consolidated cases] have made me an offer

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2. *1812 Distributing Company, et al. v. Utah-Idaho Sugar Company, et al.*, No. 633-72C2 (W.D. Wash.).

I can't refuse," and that "the Judge [Boldt] wants the *1812* case consolidated" (App. C p. 150). Mr. Ferguson later admitted that he obtained the latter information in an *ex parte* conference with Judge Boldt (App. C p. 243). This *ex parte* conference is especially disturbing because one of the petitioners, a party to the *1812* case, had opposed the consolidation of that case with the San Francisco cases and had not been given an opportunity to present its views to the court. In addition, the consolidation of the *1812* case with the San Francisco cases put Mr. Ferguson in a position where he could become—as he later did become—chairman of plaintiffs' steering committee in the consolidated cases.

In fact, at the first pretrial conference on July 8, 1975, Judge Boldt, consistent with the information conveyed in his *ex parte* conference with Mr. Ferguson and without the opportunity for briefing or oral argument by opposing parties, transferred Mr. Ferguson's *1812* action and consolidated it with the later-filed class actions in San Francisco (App. C pp. 632-634). That disposition led ultimately to Mr. Ferguson's appointment by Judge Boldt as chairman of plaintiffs' steering committee in the consolidated actions. The appointment took place in the following way:

On July 27, 1975, Mr. Ferguson requested that defendants' then liaison counsel (Stephen V. Bomse) meet with him and with plaintiffs' liaison counsel (Josef D. Cooper) and Judge Boldt in Mr. Ferguson's room at the Fairmont Hotel in San Francisco, the hotel at which Mr. Ferguson was staying during the Ninth Circuit Judicial Conference. The purpose of the meeting was to confer regarding the formulation of Pretrial Order No. 1, the general wording of which had been agreed upon previously by the parties. Upon Mr. Bomse's arrival at Mr. Ferguson's hotel room, he found Mr. Ferguson and Judge Boldt already present

and learned that Pretrial Order No. 1 already had been signed (App. C pp. 149-150).

During this conference, Judge Boldt advised Mr. Bomse that Mr. Ferguson had been designated chairman of plaintiffs' steering committee. Subsequent to the conference, Mr. Cooper, who arrived after Mr. Bomse, inquired privately of Mr. Bomse as to the circumstances under which Mr. Ferguson had been designated by Judge Boldt as chairman, *inasmuch as this had not been expressly agreed upon by plaintiffs' counsel* (App. C pp. 149-150). The inference is inescapable that Mr. Ferguson was appointed by Judge Boldt on the basis of *ex parte* representations made to him by Mr. Ferguson. The appointment was made in the absence of any other counsel and prior to any express agreement by plaintiffs' counsel that Mr. Ferguson should be appointed as chairman.

Less than a month later, on August 18, 1975, Mr. Ferguson had another *ex parte* conference with Judge Boldt, at which he discussed with the judge the establishment of a date for a class action hearing and "the procedure from here on out, as far as it was scheduled" (App. C p. 64). His discussion included many contested matters of such significance that certain of plaintiffs' counsel, in a memorandum submitted to the court, subsequently referred to this *ex parte* conference as "the second pretrial conference" (App. C p. 612). In fact, Mr. Ferguson felt that certain of the matters discussed were of sufficient importance to warrant a letter describing those matters, after the fact, to defendants' liaison counsel (App. C pp. 64-65). Defendants' liaison counsel protested this *ex parte* conference in a letter to Mr. Ferguson (App. C pp. 66-68) which read in part:

> "From your letter, it appears that not only did you appear *ex parte*, but that you discussed with the Judge

future scheduling of events in the case. We do not approve of that practice and certainly hope that it will not be repeated.

"We do not know and, thus, cannot comment upon the prevailing practice in your district. However, in the Northern District of California (to which these cases have been assigned and by whose rules they are governed), no lawyer would be permitted to communicate directly with the Court about pending litigation in the absence of opposing counsel" (App. C p. 67).

Notwithstanding defendants' protests, however, the *ex parte* conferences continued.

In November, 1975, during the pendency of proceedings for class certification, Mr. Ferguson made an *ex parte* telephone call to Judge Boldt to disclose to him that one of the defendants, Holly Sugar Corporation, had entered into a tentative settlement agreement with certain plaintiffs (App. C p. 112). Mr. Ferguson also informed Judge Boldt that plaintiffs were negotiating with two other defendants and that he would take up with Judge Boldt a proposal for the presentation of these settlements when the judge returned to Tacoma (App. C p. 247). Shortly thereafter, plaintiffs in the "Ferguson group" entered into tentative settlement agreements with two other defendants, California & Hawaiian Sugar Company and Union Sugar Division, Consolidated Foods Corporation (App. C p. 898).[3]

This *ex parte* conversation with Judge Boldt concerning the tentative settlements involved matters of crucial importance since, as is demonstrated below, the effectuation of those settlements was conditioned upon Judge Boldt's

3. The three settling defendants, all previously indicted by the government, are not parties to this petition. Petitioners are various "non-settling" defendants, including several not indicted by the government.

certifying classes which were being proposed by Mr. Ferguson's group, and which were being opposed by petitioners.[4]

On November 26, 1975, a few weeks following Mr. Ferguson's *ex parte* disclosure of the tentative settlements to Judge Boldt, Lee Freeman, counsel for the State of Illinois, plaintiff in one of the consolidated class actions, wrote a letter to Judge Boldt objecting to the court's consideration of the Holly settlement during the pendency of the class certification proceedings on the ground that the settlement excluded consumers on whose behalf Mr. Freeman sought to have classes certified. Mr. Freeman's letter specifically pointed out that the proposed settlement was conditioned upon Judge Boldt's certifying the classes supported by the "Ferguson group," and denying all others. The letter contained a description of the classes contemplated by the Holly settlement and proposed by the "Ferguson group" (App. C pp. 120-125).

On December 9, 1975, prior to a pretrial conference, Judge Boldt called liaison counsel into chambers and discussed with them the Freeman letter. Judge Boldt had read the letter and by his comments evidenced that he was aware of its substantive contents, including the fact that the settlements were contingent upon the court's approving the "Ferguson group's" classes and denying others (App. C pp. 132-133; App. C pp. 150-151). Indeed, at the pretrial

4. In fact, on May 20, 1976, Judge Boldt, over the opposition of petitioners and of counsel for many of the plaintiffs not in the "Ferguson group," certified, in substance, the classes Mr. Ferguson had proposed which made it possible to effectuate the settlements which Mr. Ferguson's group had reached with the three settling defendants. As pointed out hereafter, Judge Boldt's knowledge of the classes which would have to be certified in order to effectuate the Ferguson settlements, and his denial of that knowledge, has itself become a crucial issue bearing on Judge Boldt's bias and prejudice and his appearance of partiality.

conference on the following day, the Judge stated on the record:

> "THE COURT: This is somewhat analogous to the business of ruling on the objections to evidence in a non-jury case. You have to read the exhibit to decide whether you should read it" (App. C p. 908).

On May 20, 1976, Judge Boldt certified classes which met the conditions required to make the "Ferguson group's" settlements effective (App. C pp. 477-539).

Thereafter, Judge Boldt made a series of false statements and misrepresentations concerning his knowledge, at the time he made his order, of the fact that the proposed settlements were conditioned upon his certification of the classes supported by the "Ferguson group." These misstatements finally compelled petitioners to conclude that they had no alternative but to file a motion to disqualify Judge Boldt if these cases were to be heard by a judge free from bias and prejudice and whose impartiality reasonably could not be questioned.

As noted above, Judge Boldt was first advised by an *ex parte* communication from Mr. Ferguson that a tentative settlement had been reached between plaintiffs and Holly Sugar Corporation and that settlements were expected with two other defendants. Thereafter, by Mr. Freeman's letter of November 26, 1975, the judge was advised of the classes proposed by the Ferguson group—classes which the court would have to establish if the settlements negotiated by the Ferguson group were to be effectuated. Nevertheless, on December 10, 1975, Judge Boldt stated on the record that Mr. Ferguson had told him *only* that there was one settlement and the amount thereof (App. C p. 906). And in Pretrial Order No. 12, dated August 25, 1976, Judge Boldt represented, in flat contradiction of the facts, that:

> "Prior thereto [August 17, 1976][5] the Court had not learned the contents of the settlement agreements in any manner whatever" (App. C p. 580).

Judge Boldt's misstatements concerning his knowledge, prior to his class action ruling, of the terms of the Ferguson settlements and their relationship to the contested class certification proceedings reached even more disturbing proportions in a hearing held on September 9, 1976, in the *Fertilizer Cases*.[6] The *Fertilizer Cases* are a series of unrelated cases pending in the Western District of Washington in which Mr. Ferguson also represents certain plaintiffs and in which Judge Boldt's disqualification to hear the class motion there involved had been sought, based, in part, on his relationship with Mr. Ferguson and his conduct in the *Sugar Litigation*.[7]

At the hearing on the motion to disqualify him from participating in the *Fertilizer Cases*, Judge Boldt attempted to explain his conduct with regard to the sugar settlements negotiated on behalf of the "Ferguson group." Among other things he admitted that he had learned of the proposed settlements in an *ex parte* telephone call from Mr. Ferguson, but that:

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5. On August 17, 1976—three months *after* his order certifying classes—the court allowed plaintiffs to file an amended settlement agreement (App. C p. 1062). The original Holly agreement had been filed on December 5, 1975 (App. C p. 26).

6. The *Northwest Fertilizer Cases*, No. MF-75-1 (W.D. Wash.).

7. The *Fertilizer Cases* had initially been assigned to Judge Neill who, because of certain other commitments, requested Judge Boldt to hear and determine pending proceedings for class certification supported by Mr. Ferguson. Upon learning of the assignment of the class certification proceedings to Judge Boldt, the defendants in the *Fertilizer Cases* immediately filed a motion to disqualify Judge Boldt. Judge Boldt refused to disqualify himself, but voluntarily stepped down and reassigned the matter to Judge Neill (App. C pp. 116-117).

> "I said to him that, of course, I did not want to have any information from him or anyone else concerning the details of the negotiations, but that I thought that he might appropriately lodge the material under seal with the Clerk. . . . The Freeman letter, which I received, I think was dated the 26th, so I must have gotten it several days later. I happen to know Lee Freeman quite well, and his forceful style in presenting his contentions I am not unacquainted with. I glanced through his letter just enough to see that he was much incensed about the matter . . . But the net result was that the material was lodged under seal as I had suggested, and that is all that I acquired in the way of information about the settlements at that time" (App. C pp. 112-113).

Contrary to Judge Boldt's statements on the record in the *Fertilizer* hearing, the settlement materials were not filed under seal and petitioners were not made privy to any suggestion by the court that they be filed under seal. Furthermore, contrary to Judge Boldt's statements concerning the Freeman letter, he had, in fact, read the letter upon its receipt, acknowledged having read it at the December 10, 1975 pretrial conference in the sugar litigation,[8] and understood its salient terms.[9]

Even more disturbing than Judge Boldt's false statement concerning the filing of the settlement papers under seal is the fact that he used the statement in support of an unwarranted attack on the credibility and good faith of one of petitioners' counsel, Mr. Raven. In response to a reference by counsel for a moving party in the *Fertilizer* cases to an affidavit filed by Mr. Raven in the sugar proceedings relating to Judge Boldt's knowledge of the terms of the settlements, Judge Boldt replied:

8. App. C. p. 908. *See* pp. 9-10 *supra.*
9. App. C. pp. 132-133; 150-151. *See* p. 9 *supra.*

> "THE COURT: . . . I had them (the settlement papers) sealed and lodged under seal, and . . . I did not, in any way, read or have anything to do with those matters until they were opened in open court? [sic] He (Mr. Raven) makes no mention of that . . . (App. C p. 83).

As noted above, Judge Boldt had never directed that the settlement papers be lodged under seal and they never, in fact, were under seal. And, consequently, they were never, as Judge Boldt represented, "opened in open court."

These misrepresentations were made by Judge Boldt in an effort to convey the impression that he had not been influenced in the performance of his judicial duties by his relationship and *ex parte* contacts with Mr. Ferguson and, in particular, that his class certification decision, which effectuated the settlements the "Ferguson group" had negotiated, had not been influenced by his knowledge of the conditional nature of those settlements prior to his class action ruling. It is manifestly improper and indicative of prejudice for a judge to make false statements of fact relevant to a contested matter in an effort to attempt to eliminate the impression of bias which accompanied his acts. Further, nothing could more destroy the trust of the parties in the impartiality of the judge.

The motion to disqualify Judge Boldt was heard on December 6, 1976. Immediately upon conclusion of the oral argument, Judge Boldt read from the bench a typewritten "MEMORANDUM DECISION RE DISQUALIFICATION" in which he denied the motion (App. B pp. 10a-16a).

In his memorandum opinion, Judge Boldt:

1. Ignored certain crucial averments of fact set forth in affidavits submitted in support of the motion, particularly those dealing with the various *ex parte* communications between himself and Mr. Ferguson.

2. Refused to accept the factual averments upon which the motion was based as true for the purpose of ruling upon the motion, as required by this Court's opinion in *Berger v. United States,* 255 U.S. 22 (1921), and instead substituted his own purported recollection as to what had occurred.

3. Applied his own subjective test to determine whether, based on his version of the facts, "his impartiality might reasonably be questioned" within the meaning of 28 U.S.C. § 455(a), rather than an objective test which would have determined whether a person in petitioners' position, based on the facts set forth in the record, might reasonably have questioned the court's impartiality, thus disregarding the objective test mandated by the Congress in its 1974 amendment to 28 U.S.C. § 455(a) and followed by the Court of Appeals for the Tenth Circuit in *United States v. Ritter,* 540 F.2d 459 (10th Cir.), *cert. denied,* ..... U.S. ....., 97 S.Ct. 370 (1976).

4. Invoked the "duty to sit" concept, which concept Congress had expressly rejected in enacting the 1974 amendment to 28 U.S.C. § 455(a).

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the decision of this Court in *Berger v. United States,* 255 U.S. 22 (1921), and with the decisions of the courts of appeals of other circuits (cited at pages 18-19, *infra*) following and applying the rule of the *Berger* case, that the factual averments in an affidavit of bias and prejudice under 28 U.S.C. § 144 must be accepted by the judge as true in determining his disqualification.

The decision of the court below, in approving application of the "duty to sit" concept rejected by Congress in the 1974 amendment to 28 U.S.C. § 455(a), is in conflict with the

decisions of the Court of Appeals for the Fifth Circuit in *Parrish v. Board of Commissioners of the Alabama State Bar,* 524 F.2d 98, 103 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976), and *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

The decision of the court below is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *United States v. Ritter,* 540 F.2d 459 (10th Cir.), *cert. denied,* ..... U.S. ....., 97 S.Ct. 370 (1976), insofar as the court failed to apply the mandate of 28 U.S.C. § 455(a), as amended in 1974, that a judge shall disqualify himself if his "impartiality might reasonably be questioned" by a party litigant.

If the unexplained decision of the court below is deemed to rest upon a holding that mandamus is not the proper remedy to correct the erroneous failure of a judge to disqualify himself, its decision is in conflict with *Berger* and with the decisions of the courts of appeals of other circuits cited at pages 25-26, *infra.*

The decision of the court below involves important questions of federal law relating to the essential supervisory power of this Court over the conduct of the lower federal courts which have not been, but should be, settled by this Court.[10]

In 1974, in partial response to concern over the standards applied by judges of the lower federal courts in ruling on motions questioning their impartiality, Congress amended Section 455 of the Judicial Code by enacting into law the standards embodied in Canon 3C of the Code of

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10. *See* Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455,* 45 FORDHAM L. REV. 139 (1976) [hereinafter cited as *Disqualification of Federal Judges for Bias*]; Miller, *Public Confidence in the Judiciary: Some Notes and Reflections,* 35 LAW AND CONTEMP. PROB. 69 (1970).

Judicial Conduct.[11] The legislative history of the amendment evidences a clear Congressional intent to broaden the test for disqualification in order to preserve not only the fact but the *appearance* of impartiality, which is essential to public confidence in the judiciary. Thus, the Senate Report on the amendment stated:

> "Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute . . . This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case" (S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973)).

The decision below upholds the application of a subjective standard to the "facts" as found by the district judge. It thus disregards the law and the Congressional intent which seeks to ensure the vitality of Coke's famous principle, "aliquis non debet esse judex in propia causa" —no man shall be a judge in his own case.[12]

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11. Canon 3C, in relevant part, provides:
"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ."

12. I Coke Institutes *141a; *Dr. Bonham's Case*, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1609).
Commentators have focused on the problems inherent in a judge's being asked to rule on his own ability to be fair and impartial:
"The appearance that the judge's decision on recusal has been influenced by extrajudicial factors will be heightened if the judge explains or denies the charge of bias in conjunction with a decision against disqualification. Despite this danger, it is not unusual for a judge who considers the allegations false to disavow them in this manner (footnote omitted) because under current procedures there is no other forum in which to do so. The judge's rebuttal of facts contained in the party's sworn affidavit can be seen as evidence of a dispute between the judge and litigant and thus tends to have the inadvertent effect of bolstering the party's contention that the judge is biased against him" (*Disqualifiacation of Federal Judges for Bias, supra* note 10, at 157).

The nature and importance of the issues presented by this petition to the administration of justice in the federal courts, we submit, urgently calls for the exercise of this Court's jurisdiction.

1. The Decision of the Court Below Is in Conflict with the Decision of This Court in Berger That the Factual Averments Submitted in Support of a Motion to Disqualify Under 28 U.S.C. Section 144 Must Be Accepted as True. The Same Rule Is Applicable to 28 U.S.C. Section 455(a) in Accord with the Clear Congressional Intent.

In *Berger v. United States,* 255 U.S. 22 (1921), this Court held that factual averments submitted by a party in an affidavit of bias and prejudice under 28 U.S.C. Section 144 must be accepted as true for purposes of a request to disqualify, and that the trial court may determine only whether the facts, as alleged, are legally sufficient to give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. at 33-34). This Court stated the principle underlying its decision: "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section [Section 144] is directed" (255 U.S. at 36).

The *Berger* decision has been followed and applied by the courts of appeals of a number of the circuits.[13] As the third circuit recently said in *Mims v. Shapp,* 541 F.2d 415, 417 (3d Cir. 1976), "[n]either the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary." [14] But in direct conflict with the instructions of *Berger,* Judge Boldt based his refusal to step down on his version of the facts, which were in sharp contrast to the facts set out in the affidavits. For example, among other things, Judge Boldt found in his opinion, contrary to the facts set out in the affidavits:

> ". . . I had no part whatever in suggesting or selecting Mr. Ferguson . . . as chairman of plaintiffs' steering committee" (App. B p. 11a);

and again:

> ". . . I did not read the letter closely or recognize the import of any of the settlement conditions stated in the Freeman letter . . ." (App. B p. 12a).

13. *Mims v. Shapp,* 541 F.2d 415 (3d Cir. 1976); *Parrish v. Board of Commissioners of the Alabama State Bar,* 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976); *Pfizer Inc. v. Lord,* 456 F.2d 532, 537 (8th Cir.), *cert. denied,* 406 U.S. 976 (1972); *Hodgson v. Liquor Salesmen's Local No. 2,* 444 F.2d 1344 (2d Cir. 1971); *Willenbring v. United States,* 306 F.2d 944 (9th Cir. 1962).

14. Despite *Berger's* clear mandate, a number of the lower federal courts in disqualification proceedings have disavowed averments which they deemed or represented to be false. (*See, e.g., United States v. Hoffa,* 382 F.2d 856, 858-9 (6th Cir. 1967), *cert. denied,* 390 U.S. 924 (1968); *United States v. Parker,* 23 F. Supp. 880, 883-886 (D.N.J. 1938), *aff'd,* 103 F.2d 857 (3d Cir.), *cert. denied,* 307 U.S. 642 (1939), and have contrived in a variety of other ways to avoid the legal significance of facts set forth in affidavits of bias and prejudice submitted under Section 144 (*See* cases cited in *Disqualification of Federal Judges for Bias, supra* note 10, at 142). Indeed, at least one circuit judge has gone so far as to query whether *Berger* is any longer authoritative (*Parrish v. Board of Commissioners of the Alabama State Bar,* 524 F.2d 98, 107 (5th Cir. 1975) (en banc) (Gee, J. specially concurring), *cert. denied,* 425 U.S. 944 (1976)). These decisions emphasize the importance of an authoritative restatement by this Court of the applicable legal principles.

The rule of the *Berger* case has been expressly applied to disqualification proceedings under amended section 455 (*e.g., Spires v. Hearst Corp.,* 420 F.Supp. 304, 305-306 (C.D.Cal. 1976)). These rulings are in accordance with reason and with the expressed Congressional intent to *broaden* the standards for disqualification in the 1974 amendment.[15] As noted above, Congress intended that a judge disqualify himself "if there is a *reasonable factual basis*" (emphasis added) for doubting his impartiality.[16] Adherence to this articulated purpose requires that it not be left to the challenged judge to evaluate the factual averments submitted in support of the motion. Otherwise, the appearance cannot be avoided that the judge's decision on recusal also has been improperly influenced by extra-judicial factors, heightening the movant's belief in his partiality.[17]

2. The Court Below Erroneously Permitted the District Judge to Rely Upon the "Duty to Sit" Concept, Rejected by Congress in Its 1974 Amendment to Section 455(a).

Prior to the 1974 amendment of Section 455, the lower courts engrafted upon the disqualification statutes a judi-

15. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6354-55; 120 Cong. Rec. 36269 (1974).

16. S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973). *See* p. 16, *supra.* Although affidavits of bias and prejudice, expressly required to support disqualification under Section 144, are not required under the broadened Section 455, whatever facts may be set forth by the parties in support of disqualification under Section 455, as pointed out above, must be accepted on a standard no less objective than that which this Court in *Berger* deemed applicable to Section 144.

17. *See Disqualification of Federal Judges for Bias, supra* note 10, at 157.

cial gloss whereby a judge challenged for bias was deemed to have a "duty to sit" on a case. This concept in turn permitted a narrow construction of disqualification statutes, including what amounted to a presumption against recusal.[18]

In amending Section 455, Congress expressly rejected the "duty to sit" concept. The House Report on the new legislation noted:

> "The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute . . . . Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system" (H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355).[19]

Several lower court decisions, including two by the Fifth Circuit, have recognized and enforced Congress' abolition of the "duty to sit" concept.[20] In the case at bar, the district judge failed to implement the intent of Congress in amending Section 455(a), and denied petitioners' motion on the basis that (App. B p. 13a):

> "It would be easy to escape those onerous duties by granting the motion for my disqualification. No matter how difficult or disagreeable, I have never in my entire judicial career avoided or abandoned what I considered to be my judicial duty and I do not intend to do so now."

18. *See, e.g., Edwards v. United States,* 334 F.2d 360 (5th Cir. 1964), *cert. denied,* 379 U.S. 1000 (1965); *see generally,* 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3549 (1975); *Disqualification of Federal Judges for Bias, supra* note 10, at 144-145.

19. See also S. Rep. No. 419, 93d Cong., 2d Sess. 5 (1974).

20. *Parrish v. Board of Commissioners of the Alabama State Bar,* 524 F.2d 98, 103 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976); *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

3. The Court Below Erroneously Approved the Action of the District Judge in Deciding That the Facts Alleged (as "Evaluated" by the Judge) Were Insufficient to Show Actual Bias or Prejudice, Rather Than Deciding Whether the Facts Alleged Were Sufficient to Warrant the Moving Parties Litigant Reasonably to Question the Partiality of the Judge.

In *Parrish v. Board of Commissioners of the Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976), the majority of the court applied a "disinterested person" test to plaintiffs' motion to disqualify the trial judge:

> "We also noted that § 455(a) was intended to substitute a 'reasonable factual basis—reasonable man test' in determining whether the judge should disqualify himself (citations omitted).
>
> Considering first the § 455(a) claim, and the relevant facts and circumstances, we are of the view that a reasonable man would not infer that Judge Varner's 'impartiality might reasonably be questioned'" (524 F.2d at 103).

This test, in effect, requires a movant to demonstrate that actual bias is likely to exist. Recognizing this, Judge Tuttle's dissent, in which Judge Goldberg joined, considered the question of "reasonableness" from the perspective of the litigants—in that case, blacks denied admission to the state bar. Maintaining that the trial judge should have recused himself, the dissent said:

> "It is my opinion that . . . the new amended § 455 . . . require[s] that the judge against whom an affidavit for bias is lodged must determine only whether the allegations are such as would cause a reasonable person

standing in the same relationship as does the affiant to *believe* that the challenged judge has a 'bent of mind that may prevent or impede impartiality of judgment.'" (citation omitted) (524 F.2d at 108).

• • •

"More importantly, however, it seems to me to be clear that both the Code and the new § 455, which now speak in the same terms, has set up a standard involving the reasonableness of the belief or fear of the litigant rather than the reasonable likelihood of the existence of actual lack of impartiality. It will be noted that the language speaks in terms of the judge's impartiality being reasonably 'questioned.' It does not speak in terms of his partiality being reasonably likely to exist" (524 F.2d at 109).[21]

The broader, objective, test advanced by the dissents in *Parrish* was adopted recently by the Tenth Circuit in *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert. denied*, ... U.S. ....., 97 S. Ct. 370 (1976), in which a district court judge's refusal to disqualify himself pursuant to Section 455(a) was reversed on mandamus. The Court said:

"The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a reasonable likelihood that the cause will be tried with the impartiality that *litigants have a right to expect* in a United States district court. Unfortunately we cannot predict that it will be. Based upon all of the facts and considering the broad language of

21. Judge Wisdom also dissented, stating:
"I am in substantial agreement with Judge Tuttle's opinion. In particular, I would hold that, under *Berger* and the recent amendments to § 455, an affidavit alleging a judge's bias is sufficient if the facts alleged justify a reasonable belief on the part of the affiant that the judge may be biased. The principle involved is older than the concern Caesar had for Calpurnia's reputation" (524 F.2d at 112).

Section 455(a) requiring disqualification in any proceeding 'in which his impartiality might reasonably be questioned,' it is with reluctance that we conclude that the interests of justice require that the cause be tried by another judge, a judge from outside the district . . ." (emphasis added) (540 F.2d at 464).

In contrast to the *Ritter* decision and to the thoughtful dissents in *Parrish*, Judge Boldt failed to consider whether the totality of defendants' averments, taken as true, could lead the moving parties reasonably to question his impartiality. He held:

"The moving defendants' speculative and conjectural inference that I was influenced . . . is totally unreasonable, not supported by any established facts. . . .

"In my fully considered judgment, there is no *reasonable* basis either in fact or law for my disqualification in this litigation" (App. B. p. 13a).

In so holding, Judge Boldt not only insisted on his own version of the facts rather than accepting the facts stated in the moving parties' affidavits, as discussed above, but denied the motion based upon his purported finding that there was no reasonable basis for the *fact* of bias. The district judge, we submit, failed to determine, as he should have, whether the facts were such that his impartiality might reasonably be questioned by the parties defendant before him. Those parties, as set forth in their affidavits, had seen Mr. Ferguson, a long time and close friend of Judge Boldt, after an *ex parte* discussion with the judge and after receiving an "offer" from counsel for plaintiffs in the consolidated cases which "he could not refuse," change his mind about opposing the consolidation of a case he had filed in the Northwest with the class action *Sugar* cases pending in San Francisco; had seen Judge Boldt there-

after transfer that case to San Francisco without giving the defendants in that case (also defendants in the class action cases) an opportunity to express their opposition; had seen Mr. Ferguson thereafter appointed by the judge as chairman of the plaintiffs' steering committee in the consolidated cases on the basis of *ex parte* representations made to the judge by Mr. Ferguson and before all counsel for plaintiffs had agreed to his appointment; had seen Mr. Ferguson have other *ex parte* conferences with Judge Boldt, including at least one in which he notified the judge, *ex parte,* that the "Ferguson group" had negotiated a settlement with one defendant and that settlement negotiations were going on with two other defendants; had seen Judge Boldt advised that these settlements were conditioned upon his certifying the classes proposed by the "Ferguson group," and denying all other classes; had seen Judge Boldt thereafter certify the exact classes which would enable the "Ferguson group" to effectuate their settlement with the three defendants; and, finally, had seen Judge Boldt state, *falsely,* that he had had the Holly settlement agreement filed under seal, and also state, *falsely,* that at the time he made his class action ruling he had no knowledge of the terms of the proposed settlements, including knowledge of the fact that the settlements were conditioned upon his certifying the classes proposed by the "Ferguson group."

These "allegations are such as would cause a reasonable person standing in the same relationship [to the judge as the affiants] to *believe* that the challenged judge has a 'bent of mind that may prevent or impede impartiality of judgment'" (Judge Tuttle dissenting in *Parrish,* quoted *supra* at 22). The test articulated in the Fifth Circuit in the dissenting opinions in *Parrish,* and applied by the Tenth Circuit in *Ritter,* comports with the statutory objectives and conflicts with the decision below. We submit that this conflict is an important question which should be resolved by this Court.

4. If the Unexplained Decision of the Court Below Is Deemed to Rest Upon a Holding That Mandamus Was Not the Proper Remedy, It Is Erroneous and in Conflict with the Decisions of the Courts of Appeals of Other Circuits.

If defendants' right to a fair and impartial tribunal is to be vindicated, it is essential that the district court's denial of defendants' motion for disqualification be reviewed immediately and before a hearing on the merits. In *Berger v. United States,* 255 U.S. 22 (1921), this Court recognized that an appeal after final judgment of the denial of a motion to disqualify is inadequate:

> "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient" (255 U.S. at 36).

Predicated on this principle, lower appellate courts have repeatedly recognized that meritorious motions to disqualify pursuant to 28 U.S.C. Section 144 or Section 455 inherently present the exceptional circumstances which warrant issuance of the extraordinary writ of mandamus. *See, e.g., United States v. Ritter,* 540 F.2d 459 (10th Cir.), *cert. denied,* ..... U.S. ....., 97 S. Ct. 370, (1976); *In Re Rodgers,* 537 F.2d 1196 (4th Cir. 1976); *Pfizer Inc. v. Lord,* 456 F.2d 532 (8th Cir.), *cert. denied,* 406 U.S. 976 (1972); *Rosen v. Sugarman,* 357 F.2d 794 (2d Cir. 1966); *Occidental Petroleum Corp. v. Chandler,* 303 F.2d 55 (10th Cir. 1962),

cert. denied, 372 U.S. 915 (1963); *Connelly v. United States District Court*, 191 F.2d 692, 693 n. 1 (9th Cir. 1951).

The *Sugar Antitrust Litigation* consists of over one-hundred cases filed in separate circuits and involving complex issues which are likely to take many years to resolve. Enormous litigation costs, in expense and in the time of courts and parties, will be incurred. It is manifest that the ability of the district judge to act impartially in the eyes of the litigants must in justice be decided now.

CONCLUSION

For the reasons above set forth we submit that the petition for a writ of certiorari should be granted.

Dated: June 30, 1977

Respectfully submitted,

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(Appendices follow)

Appendix A

Cases Consolidated in the Northern District of California

PLAINTIFF	CIVIL ACTIONS NOS.
Alpac Corp.	C 75-1731
American Bakeries Co.	C 75-2495
Amezcua, Rene d/b/a Amezcua Sales & Service	C 76-0701
Amick, Melvin	C 75-0505
Anthony J. Pizza Food Products Corp.	C 75-1123
State of Arizona	C 75-2581
Armand's, Inc.	C 75-2561
A & W Operations Inc.	C 75-0505
The Bakery, Inc.	C 76-2166
Baldi Candy Company	C 75-1122
Bel Air Mart Inc.	C 75-0041
Benner Tea Co.	C 75-1957
Berkeley, California, Unified School District	C 75-0782
Blum's of San Francisco, Inc.	C 75-0117
Bodines Inc.	C 75-1128
Bresler Ice Cream Co.	C 75-1908
Brinker, Madelyne	C 76-0562
The Brothers' Restaurants Incorporated	C 75-1606
Brown & Haley	C 75-1731
Bumbleberry Enterprises Inc.	C 75-0504
State of California	C 75-1401 C-76-0561
California Foods Inc.	C 75-0504
State of Colorado	C 75-1931

Consolidated Dairy Products, Inc.	C 75-1731
C F S	C 75-1121
C F S Continental-Los Angeles Inc.	C 75-2605
Contemporary Foods, Inc.	C 74-2711
Continental-Artic, Inc.	C 75-2605
Continental Big Red, Inc.	C 75-2605
Continental Coffee Co. of Colorado	C 75-2605
Continental Coffee Co. of Houston	C 75-2605
Continental Decatur, Inc.	C 75-2605
Continental G & M Foods, Inc.	C 75-2605
Continental-Hoxie, Inc.	C 75-2605
Continental-Indianapolis, Inc.	C 75-2605
Continental-Keil, Inc.	C 75-2605
Continental Mills, Inc.	C 75-1731
Continental-Minnesota, Inc.	C 75-2605
Continental-National, Inc.	C 75-2605
Continental North Chicago, Inc.	C 75-2605
Continental Palomar of Arizona, Inc.	C 75-2605
Continental-Panetta, Inc.	C 75-2605
Continental-P.M., Inc.	C 75-2605
Continental-San Diego, Inc.	C 75-2605
Continental South Chicago, Inc.	C 75-2605
Continental Warehouse Market, Inc.	C 75-2605
Copper Penny Corporation	C 75-1909
	C 75-1910
Courtesy Food Mart	C 75-2247

"Store No. 2," Courtesy Food Mart	C 75-2247
Crescent Manufacturing Co.	C 75-1731
The Dickinson Family, Inc.	C 75-2593
DiGiorgio Corp.	C 76-0544
1812 Distributing Corp.	C 75-1731
Edwards' Old Orchard Restaurant Inc.	C 75-1121
E.H.R. Corporation	C 75-1909
	C 75-1910
Eng-Skell Company	C 74-2689
Ewald Bros., Inc.	C 75-1455
Fantasia Confections, Inc.	C 74-2728
	C 74-2727
Flavorland Foods Inc.	C 75-2619
Food Bowl Shopping Center	C 75-0504
Food Mart-Eureka	C 75-0504
Food Mart-McKinleyville	C 75-0504
Fortner-Farrell Enterprises, Inc.	C 75-0505
General Bottlers, Inc.	C 75-1546
General Host Corp.	C 75-1731
Genesis Group, Inc.	C 75-1120
Gibbs, James F.	C 75-0505
Goelitz Confectionery Company	C 76-0113
W.R. Grace & Co.	C 75-1131
	C 75-1731
Grandma Cookie Co.	C 75-2619
Grist Mill Co.	C 75-1555
Haley, Michael J. d/b/a Buttercup Bakery	C 75-0504

Hanson, Reuben J.	C 75-0505
Harold Freund Baking Co.	C 75-2190
Harold Freund Baking Co. of San Jose	C 75-2190
Health Unlimited of America, Inc.	C 75-0504
Heinemann's, Inc.	C 75-1123
Herb Alpert's Donut Shop, Inc.	C 75-1123
Holly House Foods, Inc.	C 75-0505
Home Juice Company	C 75-1128
E. O. Hudson, Sr.	C 75-0014
E. O. Hudson, Jr.	C 75-0014
State of Illinois	C 75-1124
Imperial Preserves, Inc.	C 76-0085
State of Indiana	C 76-0214
The International House of Pancakes	C 75-1909 C 75-1910 C 75-1911
International Industries, Inc.	C 75-1909 C 75-1910 C 75-1911
International Kings Table, Inc.	C 75-2561
International Kings Table of Lancaster, Inc.	C 75-2561
International Kings Table of Rosewood, Inc.	C 75-2561
Interstate Brands Corp.	C 76-0288 C 76-0280
Irish, Ralph E.	C 75-0505
ITT Continental Baking Co.	C 75-1544 C 75-1543
J.B. Big Boy Restaurants, Inc.	C 75-0504

Jianas Bros. Candy Co.	C 76-2194
John's Food Centers, Inc.	C 75-1824
Kalwest Corporation d/b/a Smitty's Pancake House	C 75-0505
State of Kansas	C 75-2350
Kelley, Farquhar & Co.	C 75-1130
King Kelly Marmalade Company	C 75-1545
Knotts Berry Farm	C 75-1545
The Kohl Corp.	C 75-1957
K-P Enterprises, Inc.	C 75-0505
Liberty Orchards Co., Inc.	C 75-1731
Love's Enterprises, Inc.	C 75-1909 C 75-1910 C 75-1911
M.A. Lopez Supermarket, Inc.	C 76-1438
Marlett, John M.	C 75-0505
Martinez, Ramiro d/b/a Piedras Negras Wholesale	C 76-0701
McCleary Industries, Inc.	C 75-1126
Merchants Restaurant, Inc.	C 75-1553
Merchants Snack Shop, Inc.	C 75-1553
Me Too, Inc.	C 75-1957
M.F.A. Milling Company	C 75-1808
Mid-American Dairymen, Inc.	C 76-1082
Milford Canning Company	C 75-2025
State of Minnesota	C 75-1456

Missouri Farmers Association, Inc.	C 75-1808
State of Montana	C 76-0533
Morris, David d/b/a Bread Garden Bakery	C 75-0504
Mother's Cake & Cookie Co.	C 75-1404
Nash-Finch Co.	C 75-1957
National Supermarkets, Inc.	C 75-1957
National Tea Co.	C 75-1957
Nesbitt Bottling Co. of El Monte	C 75-1546
State of Nevada	C 76-0719
Noel Canning Corp.	C 75-1731
Northwest Candy Co.	C 75-1454
Northwest Packing Co.	C 75-2619
Orange Gardens, Ltd.	C 75-0505
Orange Julius of America	C 75-2490
State of Oregon	C 75-1441
The Original House of Pies	C 75-1909 C 75-1910 C 75-1911
Owens Enterprises, Inc.	C 75-0505
Owens Inland Investments, Inc.	C 75-0505
Pacific Food Products	C 75-1731
The Page Milk Company	C 75-1696
The Paniplus Company	C 75-1973
Paoli's Restaurant, Inc.	C 75-2711
Passengers Restaurants, Inc.	C 75-2024
The Pastry Shop, Inc.	C 75-1957
Pearson Candy Co.	C 75-1973

Pepsi-Cola Bottling Co. of Topeka, Inc.	C 76-0702
Pepsi-Cola Bottling Co. of Yakima	C 75-1731
Piedmont Grocery Co.	C 75-0504
Plantation Baking Company, Inc.	C 75-1125
Plaza Corned Beef Center, Inc.	C 75-1121
Polunsky's Inc.	C 75-2605
Price Candy Co.	C 76-1082
Price Wholesale Grocery Incorporated	C 75-2605
Quad Lakes	C 75-0505
Quadro, Incorporated d/b/a Los Altos Ranchos Market	C 75-0504
Raleys, Inc.	C 75-0041
Randhurst Corned Beef Center, Inc.	C 75-1121
Reeser, Willis E.	C 75-0505
Regency Steak House, Inc.	C 75-1553
# 2 Regency Steak House, Inc.	C 75-1553
Richardson & Holland Corp.	C 75-1731
Saldana & Garza, Inc.	C 76-0701
Scandia Bakery	C 75-1424
Schulte, Inc.	C 75-0504
Schulze & Burch Biscuit Co.	C 75-1554
Schwan's Sales Enterprises, Inc.	C 75-2457
Scott, Jack d/b/a Scott's Food Service, Inc.	C 75-2561
S.C. Shannon Co.	C 75-1957
Seeco, Inc.	C 75-1131
Sethness Greenleaf, Inc.	C 75-2027
Sheppard, Robert L.	C 75-0505

Smith Cookie Co.	C 75-1730
Societe Candy Co.	C 75-1731
Steak-O-Rama, Inc.	C 75-1674
Steak-O-Rama No. 1, Inc.	C 75-1674
Sun Garden Packing Co.	C 75-2687
Superior Beverages Company, Inc.	C 75-1121
TAE Corp.	C 76-2195
T. C. H., Inc.	C 75-1123
Treasure Island Foods, Inc.	C 75-1127
Tri-R Vending Service Co.	C 75-2026
Tropical Preserving Company	C 75-1545
United A. G. Cooperative, Inc.	C 75-1756
Vallegra's Drive-In Markets, Inc.	C 75-0504
Valley Packers, Inc.	C 75-1130
Van Duyn Chocolate Shops, Inc.	C 75-1731
Vantage Enterprises, Inc.	C 75-0505
Villager Foods, Inc.	C 75-0117
State of Washington	C 75-1129
Washington Beverages, Inc.	C 75-1130
West Coast Growers & Packers, Inc.	C 76-1722
Whaley Enterprises, Inc.	C 75-0505
Whitevale Company, Inc.	C 75-0505
State of Wisconsin	C 75-2400
Zarda Brothers' Dairy, Inc.	C 75-1696
Zim's Restaurant, Inc.	C 74-2698 C 74-2695
Zion Industries, Inc.	C 75-1126

Appendix B

United States Court of Appeals
for the United States

In Re Sugar Antitrust Litigation
(MDL No. 201).

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT WESTERN SUGAR COMPANY & U & I INCORPORATED,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,
ANTHONY J. PIZZA FOOD PRODUCTS CORP., et al.,
Real Parties in Interest.

No. 77-1144
ORDER

Before: BROWNING and GOODWIN, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

/s/ JAMES R. BROWNING
/s/ ALFRED T. GOODWIN
U. S. Circuit Judges

Mo Cal 2/21/77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Master File MDL-201

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Memorandum Decision re Disqualification

Hundreds of pages of memoranda, affidavits and exhibits have been filed either in support or opposition to my disqualification in this litigation. All of the memoranda submitted have been reviewed in detail and I am certain that all counsel are well aware of the substance of all of the arguments and contentions, as well as the applicable case and statutory law. Therefore, my ruling will be relatively brief and cover only a few of the most significant factors involved in the determination of the motion now presented for a ruling.

The Western Sugar Antitrust Litigation was assigned to me by an order dated June 2, 1975. Attached hereto is a copy of a memorandum dated June 9, 1975 addressed to all counsel of record at that time. The memorandum ordered that a first preliminary Pretrial Conference would be held at San Francisco July 8, 1975. It contained various directions for attention by counsel prior to the conference date, recommended that all counsel meet at San Francisco a day prior to the conference, either jointly or severally, hopefully to reach agreement on various matters. One of those matters was the selection by counsel of their respective liaison counsel. By the morning of the conference, to my great satisfaction, a considerable number of potentially controversial matters had been agreed upon, some of which, including the selection by counsel of their representatives and plaintiffs' steering committee, were

reported to the court by counsel immediately prior to convening of the conference. Thus, I had no part whatever in suggesting or selecting Mr. Ferguson either as a member of the plaintiffs' liaison counsel or as chairman of plaintiffs' steering committee.

The June 9, 1975 memorandum also directed prompt preparation, briefing and argument on class action as required by F. R. C. P. 23. Full and detailed briefing on class action was completed and argument on the motion was set for Tuesday, December 9, 1975.

From prior first-hand experience I had long been familiar with Rule 23 both before and after its major amendments. This experience was fresh in my mind and useful to me.

The questions presented in determining class action in the Sugar litigation were numerous and complicated. Among them was the request of some plaintiffs for individual consumer classes in specified states and potentially nationwide. This subject was thoroughly reviewed and considered by me in depth. From my personal consideration of the memoranda it was clear to me that individual consumer classes would present serious questions as to its manageability and were disapproved by a substantial number of highly respected authorities. Prior to oral argument, after special consideration of individual consumer classes, I considered it my duty to deny individual consumer classes, unless fully persuaded in oral argument that they were manageable and, in practice, advisable in the Sugar litigation. As it turned out, I was not so persuaded and ruled accordingly.

I first learned of the Holly settlement and the possibility of others, about two weeks prior to the Pretrial Conference set for December 9, 1975 by a telephone call from Mr. Ferguson. He did not offer to tell me, and I cautioned

him against mentioning, any details of the settlement until it could be presented to all counsel in open court at the forthcoming conference. A few days prior to the conference date I received a several-page letter from Lee Freeman which I "scanned" or "skimmed" enough to learn that Mr. Freeman was vehemently opposed to any action being taken on the proposed settlements until they were fully and properly prepared for submission to the court. At that time I did not read the letter closely or recognize the import of any of the settlement conditions stated in the Freeman letter and simply had no recall concerning the settlement conditions at the time of the meeting in my chambers December 9, 1975, which was held immediately before the conference convened.

The importance that the moving defendants place on an assumed or suspected causal connected between the settlement conditions stated in the Freeman letter and the denial of individual consumer classes by the Opinion and Order Re Class Actions entered May 20, 1976, requires the following comment:

The recent and extended Section 28 U.S.C. § 455(a) provides that:

> "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned." (Emphasis added).

Any person thinking or acting *reasonably* must reach his or her opinions and conclusions upon established *facts*, as distinguished from conjecture, suspicion, rumor or inferences drawn from other than established *facts*.

The granting of consumer classes was vigorously opposed by all defendants. Denial thereof in the class action order was contrary to Mr. Freeman's contentions but in accordance with defendants' contentions. It was of extreme importance and substantial value to all defendants, including the moving defendants, because it eliminated extraordinarily large numbers of potential additional class action members as well as expenditure of great time, effort and expense to both defendants and plaintiffs. These facts of record directly and decisively negate the contention of the moving parties and their counsel that I was or appeared to be biased or prejudiced against either the defendants' lawyers or their clients. Indeed, if any reasonable inference indicating partiality on my part can be drawn from the indisputable facts above stated, it must have been in favor of the moving defendants rather than against them.

The moving defendants' speculative and conjectural inference that I was influenced to any extent whatever by what I learned of the proposed settlement conditions prior to rendering my decision denying individual consumer classes is totally unreasonable, not supported by any established facts, and inconsistent with my entire judicial career.

In my fully considered judgment, there is no *reasonable* basis either in fact or law for my disqualification in this litigation. This is an extensive litigation involving numerous problems and difficult decisions which may continue for an extended period in the future. It would be easy to escape those onerous duties by granting the motion for my disqualification. No matter how difficult or disagreeable, I have never in my entire judicial career avoided or abandoned what I considered to be my judicial duty and I do not intend to do so now.

Defendants' motion for disqualification is denied.

DONE IN OPEN COURT THIS 6th day of December, 1976.

/s/ George H. Boldt
GEORGE H. BOLDT
Sr. United States District Judge
Sitting by Designation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

June 9, 1975

Memorandum to: All Counsel

From: George H. Boldt, Sr., USDJ, WD Wash.

Subject: Sugar Industry Antitrust Litigation MDL-201

By now, presumably, counsel for all parties have received a copy of the Judicial Panel on Multidistrict Litigation Order assigning to me all of the non-government sugar industry civil antitrust actions, which assignment I have accepted. It seems highly desirous that a preliminary meeting be held with counsel for all parties at San Francisco with a view of considering and determining various ground rules and initial procedures appropriate in multidistrict litigations. Undoubtedly all counsel have had experience with this type of litigation and are well aware of these initial matters and we should be able to complete our preliminary meeting in one day.

Ordinarily, I would confer with the liaison attorneys by telephone to fix a date reasonably agreeable to all counsel; however, in this instance it is not possible. Accordingly I have chosen an early date that will, to a considerable extent avoid summer heat, vacations, etc. i.e., *10:00 a.m. Tuesday, July 8, 1975* at the courtroom assigned to me for that purpose at the United States District Courthouse in San Francisco.* With the considerable number of counsel involved in this litigation, it will be impossible to fully accommodate everyone in selecting dates for conferences. However, when liaison counsel are available they can and will minimize inconvenience for all as far as possible.

*Ceremonial Courtroom, 19th Floor U.S. District Courthouse, 450 Golden Gate Avenue.

A status report jointly prepared by counsel in each particular case shall be prepared, served and filed, with two copies thereof mailed to my chambers at P. O. Box 1993, Tacoma, Washington 98401, not later than June 30, 1975. This report should briefly summarize each and every procedure completed or in progress, copies of all prior court rulings and all other procedures or developments to this time. As of this date no procedure of any kind in any case shall be taken without express approval of this Court.

Proceedings in this litigation shall conform in all particulars to those specified in The Manual for Complex Litigation unless otherwise ordered by the Court. Counsel may apply for any modification that is considered to be more appropriate or expeditious than procedure recommended in the Manual. Any counsel not familiar with the Manual should promptly become familiar with it and particularly with respect to the early stages of this type of litigation.

Civil Rule 23 requires that applications for class action status shall be determined as soon as practicable after commencement of the action in which class action is sought. Therefore, counsel must be prepared to present their views concerning preparation for expeditious determination of the class action requests in this litigation. All proposals shall be in writing and include the specific procedures and proposed dates for their completion. When counsel have completed their meeting an agenda shall be prepared listing, in order of preference, all matters counsel propose to present at the preliminary meeting. The original and copies of the agenda shall be deposited at the Clerk's office where those desiring copies may pick them up Monday afternoon or Tuesday morning.

The Clerk's office in San Francisco is long experienced and capable in all matters directly or indirectly involving the Clerk in multidistrict litigation. Counsel unfamiliar with such matters should consult with the Clerk at San Francisco prior to the preliminary meeting with a view of becoming familiar with the procedures of that office designed to minimize time, effort and paper work performed by the Clerk.

Counsel are requested to meet jointly and/or severally in San Francisco on Monday, July 7 to select liaison counsel for all plaintiffs and defendants and to discuss and present to the Court proposed ways and means for expeditious pretrial preparation of all cases in this litigation.

1812 Distributing Corp. et al v. U&I et al, WD, Wash. No. 633-72C2, was not named as a party to the multidistrict proceedings and therefore not specified in the transfer order of the Panel. Since this case has been assigned to me from its inception and involves issues comparable to those in all cases in this litigation, counsel in that case have been requested to attend our meeting and fully participate therein.

In my judicial travels about the nation, it has been my pleasure to meet and come to know most cordially, many of the lawyers in antitrust practice. A good number of them are involved in this litigation and I look forward to continuing cordial relationships with them and developing the same relationship with those I meet for the first time on July 8, 1975.